SUPREME COURT U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-851

JAMES BATES, SR.,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Court of Appeals of Indiana is reported in 294 N.E. 2d 185.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Petitioner, who was suspected of professional gambling but was not under arrest or restraint, must have received Miranda warnings to entitle conversations between petitioner and incognito policemen to be admissible into evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Articles of Amendment I, VI, and XIV, are correctly set forth on pages 3 and 4 of the Petition.

STATEMENT OF THE CASE

On March 15, 1971, Indianapolis Police officers Richard Combs and George Grant went to Fort Wayne, Indiana, to assist the Fort Wayne Police Department in the investigation of numbers gambling in that city (Tr. p. 68). On the morning of March 15, 1971, between 7:00 and 8:00 a.m. the police officers were wearing civilian clothes. They went to the Jones Smoke Shop at 1918 S. Lafayette Street (Tr. pp. 68, 69). The petitioner was sitting at a table at the back of the shop writing bank clearing numbers (Tr. p. 69).

Officer Combs approached the petitioner, identified himself by his driver's license, and asked for four numbers. Petitioner gave him the numbers and received two dollars in payment (Tr. pp. 71-74). Later Officer Grant wrote two numbers for a bet of eighty cents (Tr. p. 89).

On the morning of March 16, 1971, the officers again went to the smoke shop and made further numbers bets with Petitioner (Tr. pp. 78-96).

Subsequently, Petitioner was arrested by Fort Wayne police for professional gambling. At the trial officers Combs and Grant testified, over Petitioner's objection, about their transactions with Petitioner and their conversations with him.

SUMMARY OF ARGUMENT

There was no error in admitting in evidence the testimony of Officers Grant and Combs concerning their transactions and conversations with Petitioner because:

1. Petitioner was not under arrest or any form of restraint whatever.

2. There was no coercion used to obtain the evidence.

3. The alleged trickery of the officers did not disqualify them from testimony.

ARGUMENT

THERE WAS NO ERROR IN ADMITTING IN EVIDENCE THE TESTIMONY OF OFFICERS GRANT AND COMBS CONCERNING THEIR TRANSACTIONS, AND CONVERSATIONS WITH PETITIONER.

The petitioner argues that the police officers from Indianapolis must have given him *Miranda* warnings before permitting him to commit the crime of professional gambling in their presence. However, *Miranda* concerns custodial interrogation, and Petitioner was not subjected to custodial interrogation. He was not subjected to any interrogation whatsoever. He was not questioned concerning crimes he was suspected of having committed nor was he questioned about any crimes in general. He was merely permitted to commit this particular crime in the officers' presence. The officers wore no uniforms or badges and for all intents and purposes they were not police officers. They were more than one hundred and fifty miles from their jurisdiction and had no authority in Fort Wayne. In addition, Petitioner was under no coercion whatever. He was not yielding to the compelling authority of the law. He was in his usual place of business and was as free from coercion as possible for any individual.

Petitioner made no confession or statement concerning past crimes. He simply accepted bets from the police officers on two separate occasions and said no more than was necessary to consummate the transactions.

Petitioner speaks of trickery and subterfuge, but the police practices used here have been recognized as the

legitimate tools of criminal investigation for as long as there have been detectives. If the officers had walked in wearing their police uniforms, or if they had informed the Petitioner of their identity as police officers or the purpose of their visits, Petitioner would have been very law-abiding—at least until the officers left.

Schneckloth v. Bustamonte (1973), 36 L.Ed. 2d 854, 93 S.Ct. 2041, cited as authority at pages 6 and 8 of the Petition, involved the Fourth and Fourteenth Amendments to the Constitution of the United States. However, the Fourth Amendment which is not involved in this case, and the Fifth and Sixth Amendments, which Petitioner charges were violated here, were not involved in *Schneckcloth v. Bustamonte.* This Court was very clear in that case when it said at page 2059:

> "Our decision today is a narrow one. We hold only that when the *subject of a search* is not in custody and the State attempts to *justify* a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." (Emphasis added.)

Petitioner argues that he was "given no choice to waive or not to waive his rights." But this Court and the State would ask, What rights? Does the petitioner have a "right" to commit the crime of selling numbers?

Petitioner interpretes the language of the Court of Appeals below at page 187 to limit its consideration to possible arrest or physical restraint of Petitioner at the time the Indianapolis detectives entered into gambling transactions with him. However, the court said, "the freedom of Bates was not restrained" at that time.

Petitioner states, "To maintain that his freedom of action was not in any way diminished, as was held by the Indiana Court of Appeals, is to deny reality". Petitioner fails to point out or even faintly suggest the nature of any restraint under which he was placed. He was in his own place of business or, at least, the place where he customarily did business, and he was doing business without any interference from any one. No one made any threats of any nature either express or implied. The two out-of-town police officers exhibited nothing to suggest authority to Petitioner and he had no reason to suspect that they were anything other than what they seemed: Two civilian gamblers from Indianapolis.

Petitioner condemns the holding of the Court of Appeals with the words, "This means that undercover police officers are free to interrogate suspects at any time and any place without giving the warnings, but other officers are not." Again, it must be re-emphasized that *there was no interrogation* of the Petitioner in this cause. Even if there had been, the consequence of the court's holding as deduced by Petitioner in the sentence quoted above are not so unreasonable. The rules regarding custodial interrogation are designed, not to give the defendant a greater chance to defeat the forces of the law (as though the whole procedure were a sport!), but because obtaining statements by coercion raises a serious doubt as to their verity. Those rules evolved out of a long history of cases in which an accused was physically tortured until he confessed to anything of which he was accused. However, that has not been the state of the law for generations.

The type of undercover work such as used in this case, i.e. where no coercion is used but the officers operate incognito and gain the confidence of the suspect in order to observe his natural operations, uninfluenced by

consciousness of the presence of law officers, has been approved by this Court in many decisions. *Sorells v. United States,* 287 U.S. 435, 41 L.Ed. 224, 53 S.Ct. 210, 86 A.L.R. 249; *Osborn v. United States* (1967), 385 U.S. 323, 17 L.Ed. 2d 312, 87 S.Ct. 429. See generally 21 *Am. Jur.* 2d, *Criminal Law,* §§ 143-145.

Petitioner's suggestion that he should have been offered an opportunity to obtain counsel before the out-of-town incognito police officers placed bets with him is absurd. What could an attorney have told him that he did not already know? The only sincere advice any attorney could have given him would have been: Don't do it! Petitioner surely knew that already. He knowingly broke the law and took his chances.

CONCLUSION

For the foregoing reasons it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

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